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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Connecticut Department of	)	
Public Utility Control for	)	RM No. 9258
Amendment to Rulemaking	)	

COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits these comments in response to the Commission's *Public Notice* in the above-referenced proceeding.[1/] As described below, the Commission should deny the Petition for Amendment to Rulemaking (the "Petition") submitted by the Connecticut Department of Public Utility Control (the "DPUC") as contrary to the Communications Act and the Commission's procompetitive policies. The DPUC has provided no evidence of circumstances that warrant elimination of the Commission's long-established prohibition against service-specific area code overlays. If the Commission nevertheless determines that it should consider eliminating the prohibition, the Commission must impose conditions to ensure that competitive disadvantages resulting from service-specific area code overlays are minimized.

I. INTRODUCTION

Vanguard is a major independent cellular carrier, serving more than 675,000 customers in 29 cellular MSAs and RSAs in 10 states. With facilities, including switches, in place, Vanguard could be a competitor to landline local exchange carriers in their service territories. As a facilities-based provider of wireless telecommunications services, Vanguard shares in the Commission's desire to eliminate barriers to competition, particularly between wireless and

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1/ Connecticut Department of Public Utility Control Files Petition for Rulemaking, Public Comment Invited, *Public Notice*, RM No. 9258, DA 98-743, released April 17, 1998.

landline services. Because proposed service-specific overlays typically are aimed at wireless services, Vanguard and its customers would be affected by any Commission decision to change its policies regarding service-specific overlays.

The Commission's policies regarding service-specific area code overlays are well-established. In its *Ameritech Order*, the Commission concluded that a proposed wireless-only area code overlay would be unreasonably discriminatory and anticompetitive in violation of the Communications Act and would be contrary to the Commission's goals of encouraging competition in communications services.[2/] The Commission confirmed this finding in the *Second Report and Order*, concluding that "any overlay that would segregate only particular types of telecommunications services or particular types of technologies in discrete area codes would be unreasonably discriminatory and would unduly inhibit competition."[3/] Accordingly, the Commission explicitly prohibited all service-specific overlays and adopted conditions for permissible all-services overlays.[4/]

[2/] Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois, *Declaratory Ruling and Order*, IAD File No. 94-102, 10 FCC Rcd 4586, 4605 (1995) ("*Ameritech Order*"). *See also* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Second Report and Order*, CC Docket No. 96-98, 11 FCC Rcd 19392, 19513 (1996) (discussing the *Ameritech Order*) ("*Second Report and Order*"), *petitions for reconsideration pending, vacated in part, People of the State of California v. FCC*, 124 F.3d 934 (8th Cir. Aug. 22, 1997), *cert. granted, sub nom. AT&T Corp. v. Iowa Util. Bd.*, 118 S. Ct. 879 (Jan. 26, 1998).

[3/] *Second Report and Order*, 11 FCC Rcd at 19518.

[4/] *Id.* The Commission adopted two requirements for any all-services area code overlay: (1) mandatory 10-digit local dialing by all customers between and within area codes in the area covered by the new code; and (2) availability to every existing telecommunications carrier authorized to provide telephone exchange service, exchange access, or paging service in the affected area code of at least one NXX in the old area code. *Id.*

Despite these pronouncements, the DPUC now seeks elimination of the service-specific overlay prohibition so that it may implement a wireless-only overlay in Connecticut. As discussed below, the Communications Act and the Commission's procompetitive objectives require that the Commission maintain the prohibition.

II. MARKET CONDITIONS DO NOT WARRANT ELIMINATION OF THE PROHIBITION AGAINST SERVICE-SPECIFIC AREA CODE OVERLAYS

A. Service-Specific Overlays Remain Discriminatory and Anticompetitive

Since the *Ameritech Order*, the Commission has prohibited service-specific area code overlays because they necessarily exclude certain services from the existing area code and segregate them in a new area code.[5/] Considering a wireless-only overlay proposed by the Texas Commission in its *Second Report and Order*, the Commission confirmed that "the presence of any one of the following elements including: (1) exclusion; (2) segregation; or (3) take-back, renders a service-specific overlay plan unacceptable and violative of the Communications Act."[6/]

The wireless-only overlay proposed by the DPUC would "mov[e] all existing wireless end user customers to a new statewide wireless NPA," thereby excluding wireless services from the existing area code, segregating wireless services in a new area code *and* taking back wireless customers' numbers.[7/] In other words, the DPUC's proposal would encompass all three of the characteristics identified by the Commission as unlawful in the *Ameritech Order*. Thus, the proposal must be rejected by the Commission as violative of the Communications Act. Indeed,

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[5/] *See Second Report and Order*, 11 FCC Rcd at 19518 (clarifying and expanding the *Ameritech Order*).

[6/] *Id.* at 19527 (finding that the Texas Commission's proposed wireless-only overlay plan would be unreasonably discriminatory under Section 202(a) and would constitute an unreasonable practice in violation of Section 201(b) of the Communications Act of 1934).

[7/] Petition at 3-4.

because exclusion and segregation are a part of *every* service-specific area code overlay proposal, the Commission cannot alter its conclusion that such overlays violate the Communications Act.[8/]

The DPUC acknowledges that these characteristics should result in prohibition of any service-specific overlay plan.[9/] Nevertheless, the DPUC argues that the Commission should alter the rules to permit service-specific overlays following a fact-specific examination of existing market conditions.[10/]

In fact, the Commission already has considered and rejected the same "fact-specific" analysis proposed by the DPUC. In its *Second Report and Order,* the Commission considered and rejected a similar interpretation of the *Ameritech Order* advanced by the Texas Commission. The Texas Commission argued that the *Ameritech Order* required a "fact-specific examination of each situation to determine whether the proposed numbering plan violates the statutory prohibition of unreasonable and unjust discrimination."[11/] The Commission rejected this interpretation and focused solely on whether the proposed overlay included exclusion and segregation.[12/] The DPUC raises no new arguments to support a change in this determination. Accordingly, the DPUC's request to include a fact-specific examination should be rejected.

8/ *See Second Report and Order*, 11 FCC Rcd 19518.

9/ In its Petition, the DPUC states that it "concurs with the FCC's requirement that the presence of any one of the following elements (i.e., exclusion, segregation or take-back) should cause the prohibition of the implementation of a service specific overlay plan." Petition at 5.

10/ *See id.* at 10 (claiming that "[a]s the Commission has based its decision to prohibit service specific overlays on competition in the telecommunications marketplace, a determination should first be made as to whether competition exists before applying the Commission's three-part test (i.e, exclusion, segregation, or take-back)").

11/ *Second Report and Order*, 11 FCC Rcd at 19524.

12/ *Id.* at 19527.

The DPUC's effort to repeat the Texas Commission's failed arguments, however, suggest that the Commission should take this opportunity to clarify that market conditions existing at the time of a proposed service-specific overlay are irrelevant to the question of whether service-specific overlays are unlawfully discriminatory and anticompetitive.[13/] Nowhere in the *Ameritech Order* or the *Second Report and Order* did the Commission condition application of the service-specific area code overlay prohibition on the presence of competition between the subject services. Such factual circumstances simply cannot change the discriminatory and anticompetitive character of service-specific area code overlays.

B. Permitting Service-Specific Overlays Would Stifle the Development of Competition

The DPUC argues that the Commission need not maintain the ban on service-specific overlays because there is no competition between landline and wireless services. This argument is wrong for two reasons. First, there is competition between wireless and landline services and, second, service-specific overlays would prevent the development of future competition.

First, the Commission should reject the DPUC's claim that "no competition between the wireline and wireless industries currently exists."[14/] The DPUC reaches this conclusion because its concept of competition is unduly narrow. While the DPUC suggests that the presence of competition is determined by whether one service is *wholly* substituted for another, that simply is not the case.[15/] The correct approach is to consider whether there is *any* substitution taking place

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[13/] In its Petition, the DPUC claims that the alleged absence of competition between wireless and landline services in Connecticut somehow changes the discriminatory and anticompetitive character of service-specific overlays. *See* Petition at 10.

[14/] *See id.* at 8.

[15/] *See id.* at 9 (alleging that substitutability is synonymous with competition).

between landline and wireless services. If wireless services are, in fact, used to substitute for landline services at any level, then there is competition between the two. As shown below, such competition plainly exists and is growing.

Although certain factors, such as the current unavailability of Calling Party Pays, limit the ability of wireless carriers to compete on a mass market scale with landline carriers or to become a replacement for a substantial portion of landline exchange service, wireless customers constantly substitute their wireless service for landline service. For instance, there is evidence to suggest that substitution is occurring between cellular services and interexchange operator-assisted and credit card payphone services.[16/] In addition, wireless carriers now offer prepaid cellular calling cards and short messaging paging services, both of which are replacing landline calls. For that matter, every time a wireless customer makes or receives a call, that call is not only a potential substitute for a landline-only call, but improves on the substituted landline call by providing ubiquitous telecommunications service. Therefore, the DPUC's claim that no competition exists should be rejected by the Commission.

Even if there were no competition today, elimination of the ban on service-specific overlays would stifle the development of competition, contrary to the Commission's procompetitive objectives. Indeed, the Commission consistently has recognized the potential for wireless services to enter into broad competition with landline services. For instance, in its *Local Competition Order*, the Commission announced its commitment to increasing consumer options for local service in accordance with the procompetitive goals of the Telecommunications Act of

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[16/] *See* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Report and Order*, CC Docket Nos. 96-128, 91-35, 11 FCC Rcd 20541, 20658 (1996) (referencing Application of McCaw and AT&T, *Memorandum Opinion and Order*, 9 FCC Rcd 5836, 5847 (1994)).

1996.[17] This commitment was affirmed by the Commission its *Universal Service Order*.[18]

Consistent with these goals, the Commission is now working to eliminate barriers to competition between wireless and landline telecommunications service providers. As evidenced by its Calling Party Pays proceeding, the Commission is investigating ways to enable wireless providers to "more readily compete with wireline services . . . ."[19]

Elimination of the service-specific area code overlay prohibition would have the practical effect of preventing the continued development of competition between landline and wireless because it will impose a competitive disadvantage on wireless services and draw attention to the distinction between these services. As the Commission explained in its *Ameritech Order*, a wireless-only area code overlay would place wireless carriers at a competitive disadvantage because only their customers would suffer the cost and inconvenience associated with an area code overlay. Thus, a wireless-only area code overlay would create yet another hurdle for wireless carriers to overcome in competition with landline carriers. Such a result would be clearly contrary to the Commission's goal of eliminating barriers to competition.

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[17] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 15505 (1996).

[18] *See* Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45, 12 FCC Rcd 8776, 8782 (1997).

[19] *See* Calling Party Pays Service Option in the Commercial Mobile Radio Services, *Notice of Inquiry*, WT Docket No. 97-207, released October 23, 1997.

III. ANY DECISION TO PERMIT SERVICE-SPECIFIC AREA CODE OVERLAYS MUST INCLUDE CONDITIONS TO ENSURE THAT RESULTING COMPETITIVE DISADVANTAGES ARE MINIMIZED.

If the Commission nevertheless determines that it should consider elimination of the service-specific area code overlay prohibition, the Commission must impose a number of conditions to ensure that competitive disadvantages resulting from service-specific area code overlays are minimized.[20/] First, the Commission must not permit the "take-back" of numbers already assigned to customers because the Commission already has found that practice to be unlawful. Second, the Commission should be sure to impose and enforce the conditions already required for all-services overlays to minimize the disparate impact of the overlay.[21/]

A. "Take-Back" of Assigned Numbers Must Continue to Be Prohibited

In its *Ameritech Order*, the Commission considered and rejected a proposal including the "take-back" of central office codes assigned to cellular and paging carriers.[22/] Specifically, the Commission found this aspect of the Ameritech's proposal to be unlawful because it would discriminate between classes of carriers.[23/] As discussed in Section II, the presence of

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[20/] Although it is uncertain what remedy a "Petition for Amendment to Rulemaking" seeks, the Commission is treating the petition as a petition for rulemaking. Consequently, the Commission cannot amend its rules in response to the Petition alone, but must issue a notice of proposed rulemaking before doing so. *See* 47 C.F.R. §§ 1.407, 1.412.

[21/] A service-specific area code overlay would be difficult to enforce in a number portability environment where customers may choose to use an existing landline telephone number for wireless service or vice versa. Should the Commission permit the DPUC to implement a wireless-only overlay, it should discuss how it intends to enforce service-specific telephone numbers under number portability.

[22/] *See Ameritech Order*, 10 FCC Rcd at 4598.

[23/] *Id. at* 4608 (explaining that the proposal would "confer a significant competitive advantage on wireline carriers that would be permitted to retain their NPA 708 numbers because customers of those carriers would be able to avoid the inconvenience associated with number changes. On the other hand, paging and cellular companies would be placed at a distinct

exclusion, segregation *or* take-back renders an area code relief plan unacceptable and violative of the Communications Act.[24/] The DPUC does not present any argument to dispute the Commission's holding that take-back proposals are unlawfully discriminatory. Moreover, take-backs impose unreasonable burdens on wireless subscribers with no concomitant benefit to them. Thus, should the Commission permit service-specific area code overlays, it must not permit the "take-back" of numbers already assigned to wireless carriers.

B. The Conditions For All Services Overlays Must Be Applied to All Overlays

In the *Second Report and Order*, the Commission concluded that it would permit all-services overlays only when they include: "(1) mandatory 10-digit dialing local dialing by all customers between and within area codes in the area covered by the new code; and (2) availability to every existing telecommunications carrier, including CMRS providers, authorized to provide telephone exchange service, exchange access, or paging service in the affected area code 90 days before introduction of a new overlay area code, of at least one NXX in the existing area code, to be assigned during the 90-day period preceding the introduction of the overlay."[25/] The Commission explained that such conditions are necessary to prevent local dialing disparity and reduce the potential anticompetitive effects of an area code overlay.[26/]

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disadvantage by the 'take-back' proposal because their customers would suffer the cost and inconvenience of having to surrender existing numbers and go through the process of reprogramming their equipment, changing over to new numbers, and informing callers of the new number.").

24/ *See supra* Part II(A).

25/ *Second Report and Order*, 11 FCC Rcd at 19518.

26/ *Id.* at 19518-19.

Because the potential for local dialing disparity and anticompetitive effects is even greater in situations of service-specific area code overlays, it is critical that the Commission impose similar conditions if it grants the DPUC's request. In the case of a wireless-only area code overlay, wireless providers already would be subject to a competitive disadvantage. A failure by the Commission to enforce these conditions would make competition with landline carriers even more difficult, if not impossible.

The issue of 10-digit dialing becomes even more critical in a number portability environment. While 7-digit dialing would create customer confusion in a non-portable service-specific overlay environment, at least customers could understand that landline-to-wireless and wireless-to-landline calls would require 10-digit dialing. Once numbers could be ported from one service provider to another, however, even this distinction would break down.

IV. CONCLUSION

The Commission should deny the DPUC's Petition. As demonstrated above, the DPUC has failed to describe any circumstances that warrant elimination of the service-specific overlay prohibition. Accordingly, Vanguard urges the Commission to affirm its prohibition of all service-specific area code overlays.

Respectfully submitted,

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May 7, 1998

CERTIFICATE OF SERVICE

I, Joslin Arnold, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 7th day of May, 1998, a copy of the foregoing "Comments of Vanguard Cellular Systems, Inc." was sent by hand delivery to the following:

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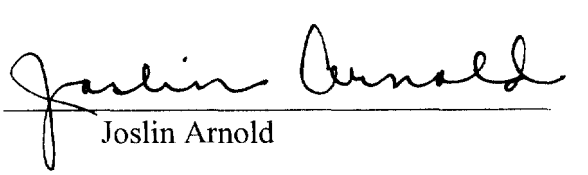

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